IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 104

PARMELEE TRANSPORTATION CO., ET AL.,
Appellants,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY CO., ET AL.,
Appellees.

Appeal from the United States Court of Appeals
for the Seventh Circuit

STATEMENT AS TO JURISDICTION.

LEE A. FREEMAN,
105 So. La Salle Street,
Chicago 3, Illinois,
Attorney for Appellant.

BRAINERD CURRIE,
PHILIP B. KURLAND,
Of Counsel.

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STATUTES AND ORDINANCES.

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In compliance with Rules 13 and 15 of this Court, the appellants submit herewith this statement particularly disclosing the basis upon which this Court has jurisdiction on appeal to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on January 17, 1957, following the denial of petitions for rehearing on February 20, 1957.

Opinions Below.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, is reported at 136 F. Supp. 476. The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported and is attached here as Appendix B, p. 18a-33a, *infra*.

Nature of Proceeding.

This is an action brought by the appellee Railroad Companies and Railroad Transfer Service, Inc. for a declaratory judgment that Chapter 28 of the Municipal Code of Chicago was inapplicable to the transfer service activities carried on by the appellee Railroad Transfer Service, Inc. in Chicago and for an injunction to prevent the officials of the City of Chicago from enforcing the ordinance. The jurisdiction of the United States District Court was invoked under 28 U.S.C. §§ 1331, 1337. The United States District Court held that the ordinance was applicable to the activities of Railroad Transfer Service, Inc. in the City of Chicago and that the ordinance as so applied was constitutional. It granted appellants' motion for summary judgment to that effect. 136 F. Supp. 476. The United States Court of Appeals for the Seventh Circuit held that the ordinance was applicable to the activities of Railroad Transfer Service, Inc. which were carried on in the City of Chicago, but ruled that the ordinance as so applied violated the Commerce Clause of the United States Constitution. Article I, Section 8, Clause 3. See appendix B, *infra*, p. 18a-33a.

Judgments Below.

The judgment of the United States District Court for the Northern District of Illinois was entered on January 12, 1956. The judgment of the United States Court of Appeals for the Seventh Circuit, review of which is sought here, was entered on January 17, 1957. Petitions for rehearing were denied by the latter Court on February 20, 1957.

Statutory Basis for Jurisdiction.

The jurisdiction of this Court to review on appeal the judgment of the Court of Appeals for the Seventh Circuit is conferred by 28 U.S.C. § 1254(2).

Cases Sustaining Jurisdiction.

Cases which sustain the jurisdiction of this Court to entertain the appeal from the judgment of the Court of Appeals for the Seventh Circuit are: *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Ott* v. *Mississippi Valley Barge Co.*, 336 U.S. 169 (1949); *Republic Pictures Corp.* v. *Kappler*, 327 U.S. 757 (1946); *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U.S. 176 (1940); *Keating* v. *Public National Bank*, 284 U.S. 587 (1931); *Richmond* v. *Deans*, 281 U.S. 704 (1930); *New York* v. *Latrobe*, 279 U.S. 421 (1929); *Natchez* v. *McNeeley*, 275 U.S. 502 (1927).

Chapter 28 of the Municipal Code of Chicago.

Section 28-1 through 28-32 of the Municipal Code of the City of Chicago are set forth in Appendix A, *infra*, p. 1a-17a.

Questions Presented.

The following questions are presented by this appeal:

1. Whether the Court of Appeals erred in holding that the City of Chicago could not constitutionally require the appellee Railroad Transfer Service, Inc., a non-certificated motor carrier engaged primarily in interstate commerce wholly within the City of Chicago, to secure a license in order to use the public streets and highways within that city, where the license requirement was a means of effectuating a plan of regulation relating to traffic control, public safety, and maintenance of the streets and highways within the City of Chicago.

2. Whether the Court of Appeals erred in gratuitously anticipating a constitutional question by not requiring the appellee Railroad Transfer Service, Inc. to exhaust its administrative remedies by applying for a license as required by the Municipal Code of the City of Chicago, §§ 28-1 through 28-32.

3. Whether the Court of Appeals erred in imputing improper motives to the City Council of the City of Chicago in order to hold that the ordinance in question was unconstitutional as applied to the appellee Railroad Transfer Service, Inc.

4. Whether the Court of Appeals erred in substituting its judgment for that of the City Council of the City of Chicago with respect to whether the licensing of motor vehicles performing transfer services within the City of Chicago was an appropriate means of effectuating the police power of the City of Chicago, exercised for the purpose of controlling traffic, effecting public safety and maintaining streets and highways within the City of Chicago.

Statement of the Case.

The facts are not in dispute.

In the central business district of Chicago there are eight railroad passenger terminals, each of which is used by one or more of the twenty-one terminal lines serving the city. None of the terminal lines operates through the city. A through passenger (*i.e.*, one whose journey both begins and ends at points other than Chicago) travels on an interline ticket and must change trains at Chicago. When the incoming line and the outgoing line use different terminals, arrangements have been made for the transportation of through passengers and their baggage from one terminal to another. Basically, such transportation constitutes the "terminal services" which are involved in this case, although in a broader sense "terminal services" includes also transfer between railroad terminals and steamship docks, and between terminals or docks and other points in the central business district. Ninety-nine percent of the passengers using these transfer services are traveling in interstate commerce.

The railroads have undertaken to arrange transfer services in Chicago instead of leaving it to the passenger to make his own arrangements for getting from one terminal to another. They have, at least since 1916, published tariffs permitting the inclusion of the transfer service in the fare, and the normal practice is to include in the interline ticket a coupon entitling the passenger to transfer between terminals. In modern times the only practicable means of transfer has been by motor vehicle operating on the streets of Chicago, and the railroads have contracted with motor carriers to provide the service.

For more than a century prior to 1955, transfer services were provided by Parmelee Transportation Company and its predecessors. *Status of Parmelee Transportation Company,* 288 I.C.C. 95 (1953). The vehicles employed have always been regarded as public passenger vehicles for hire, and have been regulated by the City of Chicago under a comprehensive scheme for the regulation of such vehicles. While Parmelee supplied the services it operated in compliance with the regulations prescribed by the City, and the validity of those regulations was not questioned.

It is important to summarize the regulatory situation as it existed in 1955.

Chapter 28 of the Chicago Municipal Code dealt with public passenger vehicles generally, and specifically with livery vehicles, sight-seeing vehicles, taxicabs, and terminal vehicles. A terminal vehicle was defined as "a public passenger vehicle which is operated under contracts with railroad and steamship companies, exclusively for the transfer of passengers from terminal stations." (Section 28-1.) Section 28-2 prohibited the operation of any vehicle for the transportation of passengers for hire on the streets of the city unless it was licensed by the City as a public passenger vehicle.

Section 28-4 provided that no vehicle should be licensed until, after inspection by the public vehicle license commissioner, it had been found to be in safe operating condition and to have adequate body and seating facilities.

Section 28-4.1 conditioned the license on compliance with further specifications for safety, relating to the adequacy of doors and aisle space.

Section 28-5 required the application for a license to be in writing and to give certain information concerning the applicant and the vehicle to be licensed.

Section 28-6 required the commissioner to investigate the "character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equipment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation" of the vehicle.

Section 28-7 imposed an annual license fee.

Section 28-12 required proprietors of public passenger vehicles to carry public liability and property damage insurance and workmen's compensation insurance, with solvent and responsible insurers approved by the commissioner. The amount of insurance to be carried and certain provisions of the policy were specified. Policies were required to be filed with the commissioner, and provision was made for the filing of an acceptable surety bond in lieu of insurance.

Section 28-13 required the payment of all judgments arising from operation of the vehicle to be paid within 90 days, irrespective of indemnity from insurance.

Section 28-14 provided for suspension of the license if, in the judgment of the commissioner, a vehicle was found unfit for use.

Section 28-15 specified various grounds for license revocation.

Section 28-31 provided:

> "No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.
>
> "It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in [the central business district]."

Section 28-32 provided fines for the violation of any provision for which another penalty was not specified, and declared that each day of continuance of a violation should be a separate offense.

On June 13, 1955, the railroads notified Parmelee of their decision to terminate its contract for the furnishing of transfer services effective September 30, 1955. The railroads entered into a new contract for the supply of these services with Railroad Transfer Service, Inc., a corporation organized for the purpose.

On July 26, 1955, the City Council amended Chapter 28 of the Municipal Code and effected certain changes in the provisions relating to terminal vehicles. The amendment was in three parts:

(1) The definition of "terminal vehicle" in Section 28-1 was changed so as to eliminate the reference to contracts with railroad and steamship companies.

(2) Section 28-31 was amended to drop the requirement that, to be eligible for a terminal vehicle license, a person must have a contract with one or more railroad or steamship companies.

(3) A new section (28-31.1) was added. Its importance in this action requires that it be set out in full:

"28-31.1. Public Convenience and Necessity. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

"In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

"1. The public demand for such service;

"2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;

"3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;

"4. Any other facts which the commissioner may deem relevant.

"If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner."

Railroad Transfer Service, Inc. (Transfer) began operations under its contract with the railroads in October, 1955. Transfer never applied for public passenger vehicle licenses as required by Chapter 28 of the Municipal Code. On the contrary, it took the position that the ordinance did not apply to its operations under its contract with the railroads, and that, if the ordinance did apply to such operations, it was void as an attempt to regulate interstate commerce. The City having indicated its intention to enforce the ordinance against Transfer, the railroads and Transfer on October 24, 1955, filed their complaint against the City and its officials in the United States District Court for the Northern District of Illinois, seeking an injunction and a declaration that the ordinance was inapplicable or, in the alternative, that the ordinance was void as applied to the plaintiffs. Jurisdiction was invoked under Section 1331 of the Judicial Code, the requisite jurisdictional amount being in controversy, and under Section 1337.

On November 10, 1955, the district court entered an order permitting Parmelee to intervene as a defendant under the provisions of Rule 24 (b), Federal Rules of Civil Procedure.

On November 17, 1955, the City moved for summary judgment and on January 12, 1956, the court, finding no genuine issue of fact involved, entered its order of summary judgment in favor of the defendants and dismissed the action. The court had filed a memorandum opinion on December 12, 1955. On January 12, 1956, concurrently with its judgment order, the court filed a supplemental memorandum together with findings of fact and conclusions of law. The court held that the ordinance was applicable to Transfer, and that it was a proper exercise of police power by the City in the interest of public safety, health and welfare.

On January 13, 1956, the plaintiffs gave notice of appeal. On January 17, 1957, the United States Court of Appeals for the Seventh Circuit filed its opinion and order reversing the judgment of the district court and remanding the cause for further proceedings. The decision of the Court of Appeals was rested squarely on the invalidity of the ordinance under the Federal Constitution and laws.

On February 20, 1957, the Court of Appeals denied petitions for rehearing filed by the City and Parmelee, respectively.

The Questions Presented Are Substantial.

I.

The Court of Appeals has stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare, leaving this important branch of the public transportation of passengers for hire within the City unregulated by any governmental agency. In so doing, the Court of Appeals has decided an important constitutional question in a way in conflict with applicable decisions of this Court.

Essentially, the Court of Appeals' decision is based on the proposition that no state authority may require a license as a condition of the right to carry on an interstate business. This Court has repeatedly held otherwise.

Our precise position must be made clear at the outset. Throughout the course of this litigation the City and Parmelee have consistently urged upon the courts a modest but clear conception of the City's power to regulate the transfer services involved, expressly conceding the established limitations on that power. To quote from their brief in the Court of Appeals (pp. 10, 11):

> "1. We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or even primarily on the ground that existing

facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck* v. *Kuykendall*, 267 U. S. 307 (1925).

"2. We *concede* that the city may not, even in the enforcement of its lawful police regulations, withdraw the privilege of carrying on interstate transportation from a motor carrier holding a certificate of convenience and necessity issued by the Interstate Commerce Commission. *Castle* v. *Hayes Freight Lines, Inc.*, 348 U. S. 61 (1954)."

Railroad Transfer Service, Inc., does not hold a certificate of convenience and necessity from the Interstate Commerce Commission, and cannot obtain one. Its operations are not within the coverage of Part II of the Interstate Commerce Act, which regulates motor carriers. *Status of Parmelee Transportation Co.*, 288 I.C.C. 95, 104 (1953). While, therefore, the City may not condition Transfer's right to carry on its interstate operations upon a determination by the City that such operations are necessary and in the public interest in economic terms, the City has the right to impose reasonable regulations in the interest of public safety and welfare, and in the interest of conserving the public streets, and to require a license in aid of such a regulatory plan. The decisions of this Court so hold. The Court of Appeals ignored the distinctions which were so carefully made, and relied upon the inapposite decisions in *Buck* v. *Kuykendall* and *Castle* v. *Hayes Freight Lines, Inc.* to support its decision.

This Court's most recent decision in point is *Fry Roofing Co.* v. *Wood*, 344 U. S. 157 (1952). A Tennessee manufacturer was transporting his goods to Arkansas by truck under an arrangement which was found to make the owner-drivers of the trucks contract carriers. The truckers had no permit or certificate from either the state or the Inter-

state Commerce Commission. Arkansas law required such carriers to obtain a permit, or "Certificate of Necessity and Convenience." The truckers sued to enjoin enforcement of the requirement, and the Arkansas Supreme Court dismissed the action. This Court affirmed. Four members of the Court, reading the statute as a regulation of interstate commerce indistinguishable from the Washington statute which was invalidated in *Buck* v. *Kuykendall*, dissented. The majority, however, accepting the interpretation placed upon the statute by state authorities, upheld the right of the state by requiring a "permit," to require registration in order that the state might properly apply its valid police, welfare, and safety regulations to motor carriers using its highways.

Concededly, the Chicago ordinance here in question involves more than a mere requirement of registration. It includes a registration requirement, and in other ways employs the licensing device in aid of valid regulations designed to promote public safety and welfare. As construed by the City and the District Court, it does not reserve to the City or its officials any discretionary power to deny a license on grounds such as those which were proscribed in *Buck* v. *Kuykendall*. The fact that the permit in the *Fry* case served only to insure a registration is not the significant factor in that case. What is significant is that the Court, following its previous decisions, there reaffirmed the power of the state to employ licensing as a sanction in aid of valid police regulations as applied to non-certificated carriers.

More significant than the holding of the *Fry* case itself is its reaffirmation of this Court's decision in *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28 (1939), decided by this Court on appeal 309 U.S. 620 (1940). This case is absolutely indistinguishable from the case at bar, and unequi-

vocally sustains the power of the state to employ licensing in aid of valid police regulation of noncertificated carriers.

A number of railroads having their eastern termini in St. Louis, Missouri, contracted with Columbia Terminals for the transportation of incoming through freight by motor truck across the Mississippi River to East St. Louis, Illinois. The freight was then carried to its destination by roads having their western termini at that point. Columbia was thus engaged in terminal transfer operations in all material respects identical with the operations of Transfer in this case. Its operations constituted a link in the chain of interstate commerce as clearly as do those of Transfer in this case. A Missouri statute required motor carriers to obtain a permit, to carry insurance, and to observe certain safety regulations. Columbia did not apply for a state permit. It did apply for a federal permit, but the Interstate Commerce Commission held, as it has held with respect to the transfer operations in this case, that the service was not subject to federal regulation under the Motor Carrier Act. When the state took steps to enforce the licensing requirement, Columbia sued for an injunction in a three-judge court. In a careful opinion, reviewing the pertinent decisions of this Court, the district court recognized that, under *Buck* v. *Kuykendall* and similar cases, the commerce clause is violated when a state "undertakes to exercise the right to say what interstate commerce will benefit the State and what will not." (30 F. Supp. at 32.) It held, however, that reasonable police regulations are not an unlawful burden upon interstate commerce and are justified so long as Congress has not occupied the field. (30 F. Supp. at 31.) So holding, the district court dismissed the bill for want of jurisdiction, because of the absence of a substantial federal question.

While the case was disposed of *Per Curiam* in this Court, it is apparent that the Court's disposition was a carefully considered one. The Court's order was: "The decree is vacated and the cause is remanded to the District Court with directions to dismiss on the merits." (309 U. S. 620.) In other words, the Court, while regarding the contentions made by Columbia as sufficiently substantial to support the jurisdiction of a three-judge court, unanimously agreed that the district court had rightly rejected those contentions on the merits, and had rightly upheld the validity of the state regulatory law.

The holding in *Columbia Terminals* was again approved in the *Fry* case, which contains this Court's authoritative construction of that holding. The majority in the *Fry* case said:

> "In *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, the District Court upheld a Missouri statute reading: 'It is hereby declared unlawful for any motor carriers . . . to use any of the public highways of this state for the transportation of persons or property, or both, in interstate commerce without first having obtained from the commission a permit so to do. . . .' *Buck* v. *Kuykendall*, 267 U. S. 307, was held not to require the statutes' invalidation, since Missouri had not refused to grant a permit on the ground that the state had power to say what interstate commerce would benefit the state and what would not. Agreeing with this constitutional holding, we ordered the complaint dismissed." (344 U. S. 157, 162, note 5.)

The minority in the *Fry* case also referred to *Columbia Terminals*:

> "*Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, whose ruling we sustained, 309 U. S. 620, is not in point. The Interstate Commerce Commission had ruled in that case that the particular operations there involved were not covered by the Federal Act. See 30 F. Supp., at 30." (344 U. S. 157, 166, note 3.)

Thus, while four members of the Court were of opinion that the doctrine of *Columbia Terminals* did not apply to a noncertificated carrier subject to the Motor Carrier Act, *all* members of the Court reaffirmed the doctrine of that case and its application to carriers *not subject* to the act. We reiterate that the Interstate Commerce Commission has held that the terminal transfer services engaged in by Transfer are not subject to regulation under Part II of the Interstate Commerce Act, covering motor carriers, just as it held that Columbia's terminal transfer services were not subject to regulation under the Motor Carrier Act.

The teaching of the cases is clear. No state or city can withhold a permit to engage in interstate motor transportation on the ground that the state has power to say what interstate commerce will benefit the state and what will not —*i.e.*, to deny a permit on "economic" grounds. But where a carrier does not hold a certificate from the Interstate Commerce Commission—or, at least, where the carrier is not subject to regulation as a motor carrier by the Commission—a state can employ licensing as a sanction for valid regulatory measures designed for the promotion of public safety and welfare.

The decision of the Court of Appeals is also in conflict with the following cases, which are to the same effect:

(1) *Eichholz* v. *Public Service Comm'n*, 306 U. S. 268 (1939) (upholding the power of Missouri to revoke a state permit to engage in interstate motor carrier operations where the carrier had violated state laws relating to intrastate operations; the carrier had applied for a certificate from the Interstate Commerce Commission, but the Commission had not acted on the application. The case is cited with approval in the *Fay* case, 344 U.S. at 162, note 5.)

(2) *H. P. Welch Co.* v. *New Hampshire*, 306 U.S. 79 (1939) (upholding the power of New Hampshire to suspend

the state "registration certificate" of an interstate motor carrier for violation of state law relating to hours of service for drivers. The violations occurred after the enactment of the Federal Motor Carrier Act, but before the effective date of regulations covering hours of service promulgated by the Interstate Commerce Commission. The principle, applicable to the instant case, is that, in the absence of applicable federal regulation, a state may employ licensing as a sanction for regulations designed to promote the public safety and welfare. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(3) *McDonald* v. *Thompson*, 305 U.S. 263 (1938) (upholding the power of Texas to withhold a certificate from an interstate carrier on the ground that the proposed operations would subject the highways involved to excessive burden and would endanger and interfere with ordinary use by the public. The carrier was subject to, but had no certificate under, the Federal Motor Carrier Act. The Court also held that the carrier's interstate operations without the certificate required by Texas law did not qualify it as having been "in bona fide operation as a common carrier" under the "grandfather" clause of the Motor Carrier Act. The case is cited with approval in *Fry*, 344 U.S. at 162, note 5.)

(4) *Buck* v. *California*, 343 U.S. 99 (1952) (upholding the power of San Diego county to require a permit for taxicab operations in foreign commerce, as a sanction for standards relating to the service and public safety. Taxicabs, like terminal vehicles, are excluded from the coverage of Part II of the Interstate Commerce Act with exceptions not here material.)

The same principle was established prior to the enactment of the Federal Motor Carrier Act, and the cases so holding are still in point since that Act does not cover

the operations in question here: *Clark* v. *Poor*, 274 U.S. 554 (1927); *Hicklin* v. *Coney*, 290 U.S. 169 (1933); *Bradley* v. *Public Utilities Comm'n of Ohio*, 289 U.S. 92 (1933); *Continental Baking Co.* v. *Woodring*, 286 U.S. 352 (1932); and see *Texport Carrier Corp.* v. *Smith*, 8 F. Supp. 28 (D. C. S. D. Tex., 1934).

These principles were not affected by the decision of this Court in *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61 (1954). That case held that a state could not *suspend* the privilege of a certificated interstate carrier to do business, and it implied that a state could not in the first instance withhold from such a carrier the privilege of doing interstate business, even as a sanction for the violation of valid police regulations. It is abundantly clear from a reading of the Court's opinion, however, that the principle is limited to carriers holding certificates of convenience and necessity from a federal agency, and has no application to carriers not holding such certificates and not eligible for them.

II.

A matter of sheer logomachy has introduced confusion and error into the decision of the Court of Appeals, and should be clarified here once and for all. The Chicago ordinance here in question, in requiring licenses for terminal vehicles, speaks of a finding by the commissioner that public convenience and necessity require the service; and among the factors to which the commissioner is required to give "due consideration" is "The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service." (Municipal Code of Chicago,

Section 28-31.1. *Infra* p. 16a-17a) Read superficially, this language appears to authorize the commissioner to exercise a discretion on the basis of economic considerations, such as were proscribed by *Buck* v. *Kuykendall.* As this Court has often recognized, however, regulatory measures of this kind are commonly drawn for application to both intrastate and interstate operations; the term "public convenience and necessity" does not necessarily import the exercise of discretion on the basis of "economic" considerations; the validity of the regulation will be upheld so long as inappropriate provisions are not applied to interstate operations; and the courts will accept as authoritative the construction placed on the regulation by appropriate state officials, disclaiming power or intention to give the regulation unconstitutional application. In rejecting the interpretation placed on the ordinance by the City and its officials, and in presuming that the ordinance would be unconstitutionally applied, the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

In the cases which have been cited, upholding state power to license interstate motor carriers in the interest of public safety and welfare and highway conservation, the statutory requirement normally was that the carrier obtain a certificate of public convenience and necessity. This was so in *Clark* v. *Poor,* 274 U.S. 554 (1927) (see Ohio Gen. Code, Section 614-87 (1929)); *Hicklin* v. *Coney,* 290 U.S. 169 (1933) (see S.C. Code 1932, Section 8510); *Bradley* v. *Public Utilities Comm'n of Ohio,* 289 U.S. 92 (1933); *Eichholz* v. *Public Utilities Comm'n of Missouri,* 306 U.S. 268 (1939); and *McDonald* v. *Thompson,* 305 U.S. 263 (1938). Sometimes, as in *Columbia Terminals Co.* v. *Lambert,* 30 F. Supp. 28 (E.D. Mo. 1939), *Buck* v. *California,* 343 U.S. 99 (1952), and *Fry Roofing Co.* v. *Wood,* 344 U.S. 157 (1952), the authority to operate has been designated

a "permit"; but that has not been a distinguishing factor. Typically, as in the *Columbia Terminals* case, the statute has also contained language specifying "economic" factors to be taken into consideration by the licensing official—language inappropriate to the exercise of the licensing power with respect to interstate carriers. But this Court has never decided the cases on merely literal grounds. This Court has never doubted that a "certificate of public convenience and necessity" may appropriately be withheld on grounds relating to the valid exercise of the police power, and has invalidated statutes requiring such certificates only when the carrier has been able to show, as in *Buck* v. *Kuykendall*, that the license has been denied on improper grounds.

(See also *Ex parte Truelock*, 139 Tex. Crim. Rep. 365, 140 S.W. 2d 167, 169 (1940); *Cannon Ball Transportation Co.* v. *Public-Utilities Comm'n of Ohio*, 113 Ohio St. 565, 149 N.E. 713 (1925); *Wald Storage and Transfer Co.* v. *Smith*, 4 F. Supp. 61 (S.D. Tex., three-judge court 1933) aff'd 290 U.S. 596 (1933).)

In the Court of Appeals, the *Columbia Terminals* case—a powerful precedent, on all fours with the case at bar—was disposed of in a footnote (note 26) on the ground that, while the licensing statute spoke in terms of a finding of public benefit (*i.e.*, of economic considerations), the state had expressly admitted that it lacked such power and made no such demand. But in this respect the cases are identical. In Appellees' Brief in the Court of Appeals, signed by John C. Melaniphy, Corporation Counsel and chief legal officer of the City of Chicago, representing the City, the Mayor, the Public License Commissioner, and the Commissioner of Police, there appears the following clear statement (at page 36):

> "We *concede* that the city may not withhold a license to carry on interstate transfer operations solely or

even primarily on the ground that existing facilities are adequate, or that additional operations will adversely affect the competitive situation, or other such 'economic' grounds. *Buck* v. *Kuykendall*, 267 U.S. 307 (1925)."

In Part III of the same brief (pages 51-58) the appellees in the Court of Appeals, including the City and all appropriate officials thereof, urged that the proper construction of the ordinance was the one adopted by Judge LaBuy in the District Court, *viz.*, that the ordinance did not authorize the withholding of a license on economic grounds, but only on considerations relating to public safety, traffic, and the conservation and maintenance of streets. Precisely as in *Columbia Terminals*, the City disclaims any and every authority or intention to give to the ordinance in question an unconstitutional application. It follows that the full force of the reasoning in *Columbia Terminals* is applicable to this case:

> "The mere susceptibility of a statute to a construction which could render it unconstitutional does not afford sufficient ground for injunctive relief where, as here, it does not appear that the statute has ever been so construed, where the enforcing authorities affirm a recognition of its unconstitutionality if so construed and disclaim any intention of doing so, and where plaintiff's real ground for relief is not the application of the Statute to it." (30 F. Supp. at 32.)

Clark v. *Poor*, 274 U.S. 554 (1927), is also squarely in point. The Ohio statute required a certificate of public convenience and necessity. Without applying for a certificate, the carrier, engaged exclusively in interstate commerce, sought an injunction. A three-judge court dismissed the bill, and this Court affirmed, saying (at 556):

> "It appeared that while the Act calls the certificate one of 'public convenience and necessity,' the Commis-

sion had recognized, before this suit was begun, that, under *Buck* v. *Kuykendall*, 267 U.S. 307 and *Bush* v. *Maloy*, 267 U.S. 317, it had no discretion where the carrier was engaged exclusively in interstate commerce, and was willing to grant to plaintiffs a certificate upon application and compliance with other provisions of the law."

The plaintiffs in that case also contended that the decree should be reversed because the statute provided that no certificate should issue until the carrier filed cargo insurance policies. This Court said:

> "The lower court held that, under *Michigan Public Utilities Commission* v. *Duke*, 266 U.S. 570, this provision could not be applied to exclusively interstate carriers . . .; and *counsel for the Commission stated in this Court that the requirements for insurance would not be insisted upon.* Plaintiffs urge that because this was not conceded at the outset, it was error to deny the injunction. The circumstances were such that it was clearly within the discretion of the court to decline to issue an injunction . . ." (274 U.S. at 557-58.) (Emphasis ours)

In refusing to accept the construction placed upon the ordinance by responsible city officials, and in disregarding the canon that legislation is to be construed if possible to avoid constitutional questions, the Court of Appeals departed from salutary principles established by the decisions of this Court. See *Phyle* v. *Duffy*, 334 U.S. 431, 441 (1948); *Gerende* v. *Board of Supervisors of Elections of Baltimore City*, 341 U.S. 56, 57 (1951); *Fox* v. *Washington*, 236 U.S. 273 (1915); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450, 470 (1945).

III.

In gratuitously anticipating constitutional questions, and in not requiring the plaintiffs to exhaust their administrative remedies, the Court of Appeals decided a constitutional question in a way in conflict with applicable decisions of this Court.

Since the City clearly has power, under the cases cited, to require a license as a means of enforcing valid regulations designed to promote public safety and welfare, the invalidation of the ordinance must rest upon apprehension that the ordinance will be unconstitutionally applied, despite the responsible assurances given by counsel that there is no such intention. Indeed, the opinion of the Court of Appeals appears to adopt the charge made by counsel for the railroads, that "as a purported safety measure, [the ordinance] is sham and spurious (p. 29a, *infra*); and that Court itself charges without qualification that the ordinance is an attempt to give Parmelee a monopoly of terminal vehicle licenses, "rather than an exercise of the city's police power over traffic." (p. 30a, *infra*.)

These are serious charges for any court to make against any legislative body. It is particularly regrettable that a United States court should make such charges against a city council, where the city and all its responsible officials have assured the court that they construe the ordinance otherwise, and where the parties invoking the jurisdiction of the court have failed and refused to apply for licenses. Not having applied for a license, Transfer is in the position of obdurately refusing the city's assurance that the ordinance will be applied constitutionally and in good faith, and of charging irresponsibly that the city will, "in the guise of an exercise of its police power, . . . cripple interstate commerce." (p. 29a, *infra*.) Throughout this litigation, the attack on the ordinance has been a com-

pound of speculation and conjecture. The argument has been that if Transfer were to apply for a license (which it has no intention of doing), the commissioner would deny the application, and that the evidence (which has not been introduced) in the record (which has not been made) before the commissioner could not support the action (which has not been taken) if it purported to rest on considerations of public safety and welfare as distinguished from prohibited economic considerations. The validity of the ordinance and the good faith of the city cannot be impugned in such a way.

We need not dwell on cases establishing the general principle that requires exhaustion of administrative remedies (*Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Aircraft and Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752 (1947); the exact question as it is presented in this case has been decided by this Court. The situation here is identical with that in *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, aff'd 309 U.S. 620 (1940). There the district court said:

> "One who is within the terms of a statute, valid upon its face, that requires a license or certificate as a condition precedent to carrying on business may not complain because of his anticipation of improper or invalid action in administration [cited cases omitted]. The plaintiff has neglected to make application for a permit covering its operations. . . . Until it does so, it is not in position to invoke the injunctive powers of this Court to restrain the enforcement of the State laws. 'The long-settled rule of judicial administration [is] that no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.' " (30 F. Supp. at 33-34.)

Among the cases which have been cited herein, not one has held unconstitutional a state statute or municipal ordinance requiring a license for interstate motor carrier op-

erations *in the absence of an application for a license and a denial on unconstitutional grounds.* The cases holding licensing laws invalid are all cases in which the carrier followed the appropriate procedure, pursued his administrative remedies, applied for a license, made a record suitable for judicial review, and presented the reviewing court with evidence that the license had been denied or withdrawn on unconstitutional grounds. Where the carrier has sought relief by injunction or otherwise without pursuing his administrative remedies, relief has been denied.

In *Buck* v. *Kuykendall,* 267 U.S. 307 (1925), where the Court held the licensing requirement invalid, it acted on the basis of a record showing the denial of a license and the grounds for denial. The same is true of *Bush* v. *Maloy,* 267 U.S. 317 (1925).

On the other hand, in *Continental Baking Co.* v. *Woodring,* 286 U.S. 352 (1932), where the carrier sought an injunction without applying for a license, relief was denied. In *Hicklin* v. *Coney,* 290 U.S. 169 (1933), where the carrier, without applying for a license, resisted an enforcement proceeding on the ground of invalidity, the defense failed. In *McDonald* v. *Thompson,* 305 U.S. 263 (1938), where the carrier sought an injunction without applying for a license, relief was denied. In *Buck* v. *California,* 343 U.S. 99 (1952), the defendants asserted the invalidity of the statute as a defense to an enforcement proceeding. While they had made oral applications for licenses, the ordinance required written applications, and the record failed to show the grounds for denial. The situation was equivalent to one in which no application had been made, and the defense failed. In *Fry Roofing Co.* v. *Wood,* 344 U.S. 157 (1952), the carrier sought an injunction without applying for a license, and relief was denied. Similarly, in *State* v. *Nagle,* 148 Me. 197, 91 A.2d 397 (1952), the carrier, with-

out applying for a license, asserted the invalidity of the ordinance as a defense to an enforcement proceeding. The defense failed, the court saying:

> "Even though the issue of the permit is mandatory provided the condition of the highways to be used is such that it would be safe for the operation proposed, and the safety of other users of the highways would not be endangered thereby, the Public Utilities Commission under the statute here in question has not only the duty but the power and authority to determine these questions as questions of fact." (148 Me. 197, 207-8, 91 A.2d 397, 402.).

To the same effect are *Lehon* v. *Atlanta*, 242 U.S. 53, 55-56 (1919); *Hall* v. *Geiger-Jones Co.*, 242 U.S. 539, 553-54 (1917); *Gundling* v. *Chicago*, 177 U.S. 183, 186 (1900).

The point is made with great clarity in *Clark* v. *Poor*, 274 U.S. 554 (1927). There the carrier, ignoring the provisions of the statute, operated without applying for a certificate, and sought injunctive relief against enforcement. There, as here and as in *Fry* and *Columbia Terminals*, the licensing laws read in terms of economic factors as well as of valid police regulation, but the local authorities had disclaimed any authority or intention to withhold a license on grounds proscribed by *Buck* v. *Kuykendall*. Relief was denied. "The plaintiffs did not apply for a certificate or offer to pay the taxes. They refused or failed to do so, not because insurance was demanded, but because of their belief that, being engaged exclusively in interstate commerce, they could not be required to apply for a certificate or to pay the tax. Their claim was unfounded." This Court's disposition of that appeal furnishes, we submit, the model for the disposition of the appeal in this case:

> "The decree dismissing the bill is affirmed, but without prejudice to the right of the plaintiffs to seek

appropriate relief by another suit if they should hereafter be required by the Commission to comply with conditions or provisions not warranted by law." (274 U.S. at 558.)

IV.

On the basis of certain records of the City Council and its committee on local transportation, the Court of Appeals attributed to the City Council improper motives in the enactment of the amendment of 1955, and on the basis of such supposed motives held invalid an ordinance otherwise valid. In so doing the Court of Appeals decided a federal question in a way in conflict with applicable decisions of this Court.

This Court has reiterated, time and again, that it is not the function of the federal courts to question the motives of legislatures. Only recently, speaking for the Court, Mr. Justice Frankfurter said:

> "The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. See cases cited in *Arizona* v. *California*, 283 U.S. 423, 455." *Tenney* v. *Brandhove*, 341 U.S. 367, 377 (1951).

That this doctrine refers not only to the motives of federal legislators, which were involved in the *Brandhove* case, but to legislators of the states as well, is apparent not only from the reference to *Fletcher* v. *Peck*, but from the specific statement in *Arizona* v. *California*: "Similarly, no inquiry may be made concerning the motives or wisdom of a state legislature acting within its proper powers." 283 U.S. at 455, n. 7. Or to use Mr. Justice Holmes' language, in a case which, like this one, involved an attack on a legislature's amendment of its own legislation: ". . . we do not inquire into the knowledge, negligence, methods or

motives of the legislature if, as in this case, the repeal was passed in due form." *Calder* v. *Michigan ex rel. Ellis*, 218 U.S. 591, 598 (1910).

Of the long series of cases substantiating the proposition that the Court of Appeals erred in looking beyond the legislation to the motives of the legislators, two more are of particular interest. In *Daniel* v. *Family Security Life Ins. Co.*, 336 U.S. 220 (1949), the contention was that the legislation in issue had been secured by competitors of the plaintiff in order to maintain their own preferred position rather than to abate evils which the state had the right to abate. The Court there sustained the regulation and stated:

> "It is said that the 'insurance lobby' obtained this statute from the South Carolina legislature. But a judiciary must judge by results, not by the varied factors which may have determined legislators' votes. We cannot undertake a search for motive in testing constitutionality." (336 U.S. at 224.)

In *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106 (1949), an attack was made on a police regulation which forbade trucks to carry advertising on their sides unless the advertising was on behalf of the owner and operator of the trucks. The challenge was made, in part on the grounds of the Commerce Clause, that such a regulation could not possibly have anything to do with the exercise of the police power. In the course of its opinion the Court said:

> "We would be trespassing on one of the most intensely local and specialized of all municipal problems if we held that this regulation had no relation to the traffic problem of New York City. It is the judgment of the local authorities that it does have such a relation. And nothing has been advanced which shows that to be palpably false." (336 U.S. at 109.)

"The local authorities may well have concluded that those who advertise their own wares on their trucks do not present the same traffic problem in view of the nature or extent of the advertising which they use. It would take a degree of omniscience which we lack to say that such is not the case. If that judgment is correct, the advertising displays that are exempt have less incidence on traffic than those of appellants." (336 U.S. at 110.)

"It is finally contended that the regulation is a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Many of these trucks are engaged in delivering goods in interstate commerce from New Jersey to New York. *Where traffic control and the use of highways are involved and where there is no conflicting federal regulation, great leeway is allowed local authorities, even though the local regulation materially interferes with interstate commerce. The case in that respect is controlled by South Carolina State Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177." (336 U.S. at 111, emphasis added.)

See also *Breard* v. *Alexandria*, 341 U.S. 622, 639 (1951).

That Illinois law requires the same result is made abundantly clear by the long line of authorities cited in Judge LaBuy's opinion in the District Court. See 136 F. Supp. 476, at 483.

Furthermore, the Court of Appeals has misconceived and misconstrued the legislative history and purpose involved in the 1955 amendment. To the extent that this history has any pertinence, it reveals clearly that the City did not seek to grant an exclusive right to Parmelee or any other company, but that the City exercised its right to control the commercial use of its streets by terminal vehicles; sought to permit Parmelee to continue operating commercially over city streets without the necessity of a

contract with the railroads, and permitted additional licenses to be issued upon appropriate showing. Having broadened the scope of what constitutes terminal vehicles, the City set up a reasonable system for regulating the issuance of additional licenses. This is in line with action taken by the City Council in other similar situations involving the City's licensing powers.

In short, the Court of Appeals erroneously sought to determine the motive of the City Council in amending the ordinance; speculated erroneously on the nature of that motive, attributing illegal and improper motives to the City Council; and, disregarding the responsible assurances and commitments made to the court by the city's chief legal officer, struck down a valid ordinance on the basis of an unwarranted and presumptuous conviction that the ordinance, as a police measure, was "sham and spurious." In so doing, the court exceeded its judicial powers.

V.

In taking the position that no governmental control over the number of terminal vehicles in operation was necessary in order to avoid traffic congestion, protect the safety of the public, and preserve the streets of the city, and that the license requirement was not a necessary sanction for the implementation of the city's legitimate police powers, the Court of Appeals assumed to substitute its judgment for that of the Council on a matter clearly within the legislative discretion, and therefore decided a federal question in a way in conflict with applicable decisions of this Court.

At page 11 of its opinion the Court of Appeals says:

> "To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons is-

> sued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles." (Appendix page 29a)

This is tantamount to a determination that regulation of the number of terminal vehicles in operation is unnecessary for protection of the public safety and for conservation of the streets. Such a determination calls for the exercise of legislative judgment. Regulation of the use of the streets is committed to the City Council, which has determined that regulation of such vehicles is necessary in the public interest. Moreover, the Court's statement overlooks those aspects of the ordinance which regulate aspects of the terminal vehicle business other than the mere number of vehicles employed.

At page 13 of its opinion the Court of Appeals says:

> "If Transfer's vehicles do not conform to the requirements contained in the prior [sic] ordinance, the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accordance with § 28-32. So, also, whenever Transfer is found guilty of violating § 28-17 *the city may proceed against it according to the penalties section.*" (Emphasis supplied. Appendix page 31a)

Passing the point, which becomes clear on even a cursory reading of the ordinance, that licensing is in many respects the only effective implementation for the city's plan for regulating public passenger vehicles, it is abundantly clear that the court exceeded its judicial authority in passing judgment on the need for the license as a sanction. If, as we submit, the City has power to use the licensing sanction in furtherance of its legitimate police powers, it was not competent for the Court of Appeals to determine that that sanction is not to be employed because

direct remedies by way of fines for violations of the safety provisions of the ordinance are adequate. The choice of available sanctions to implement a regulatory scheme is surely a matter for legislative discretion alone. *Robinson* v. *United States*, 324 U. S. 282, 286 (1945); *Building Service Employers International Union, Local 262* v. *Gazzam*, 339 U.S. 532, 540 (1950); *Watson* v. *Buck*, 313 U.S. 387, 403 (1941).

ALTERNATE PETITION FOR CERTIORARI

Appellant herein and the City of Chicago are also petitioning for certiorari with respect to the same judgment. We believe that the Supreme Court of the United States has jurisdiction over this appeal. If we are mistaken in this, however, it is requested that the writ of certiorari be issued. *Watson* v. *Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Bradford Electric Light Co.* v. *Clapper*, 284 U.S. 221 (1931).

Respectfully submitted,

LEE A. FREEMAN,
Attorney for Parmelee Transportation Company, Appellant,
105 So. LaSalle Street,
Chicago 3, Illinois.

BRAINERD CURRIE,
PHILIP B. KURLAND,
Of Counsel.

April, 1957.

APPENDIX A.

MUNICIPAL CODE OF CHICAGO
CHAPTER 28
PUBLIC PASSENGER VEHICLES

28-1. As used in this chapter:

"Busman" means a person engaged in business as proprietor of one or more sightseeing buses.

"Cabman" means a person engaged in business as proprietor of one or more taxicabs or livery vehicles.

"Chauffeur" means the driver of a public passenger vehicle licensed by the city of Chicago as a public chauffeur.

"City" means the city of Chicago.

"Coachman" means a person engaged in business as proprietor of one or more terminal vehicles.

"Commissioner" means the public vehicle license commissioner, or any other body or officer having supervision of public passenger vehicle operations in the city.

"Council" means the city council of the city of Chicago.

"Livery vehicle" means a public passenger vehicle for hire only at a charge or fare for each passenger per trip or for each vehicle per trip fixed by agreement in advance.

"Person" means a natural person, firm or corporation in his own capacity and not in a representative capacity, the personal pronoun being applicable to all such persons of any number or gender.

"Public passenger vehicle" means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois.

"Sightseeing vehicle" means a public passenger vehicle for hire principally on sightseeing tours at a charge or fare per passenger for each tour fixed by agreement in advance or for hire otherwise at a charge for each vehicle per trip fixed by agreement in advance.

"Taxicab" means a public passenger vehicle for hire only at lawful rates of fare recorded and indicated by taximeter in operation when the vehicle is in use for transportation of any passenger.

"Taximeter" means any mechanical device which records and indicates a charge or fare measured by distance traveled, waiting time and extra passengers.

"Terminal vehicle" means a public passenger vehicle which is operated exclusively for the transportation of passengers from railroad terminal stations and steamship docks to points within the area defined in Section 28-31.

28-2. It is unlawful for any person other than a metropolitan transit authority or public utility to operate any vehicle, or for any such person who is the owner of any vehicle to permit it to be operated, on any public way for the transportation of passengers for hire from place to place within the corporate limits of the city, except on a funeral trip, unless it is licensed by the city as a public passenger vehicle.

It is unlawful for any person to hold himself out to the public by advertisment or otherwise as a busman, cabman or coachman or as one who provides or furnishes any kind of public passenger vehicle service unless he has one or more public passenger vehicles licensed for the class of service offered; provided that any association or corporation which furnishes call service for transportation may advertise the class of service which may be rendered to its members or subscribers, as provided in this chapter, if it assumes the liability and furnishes the insurance as required by section 28-23.

28-3. Nothing in this chapter shall be construed to prohibit any public passenger vehicle from coming into the city to discharge passengers accepted for transportation outside the city. While such vehicle is in the city no person

shall solicit passengers therefor and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of the vehicle. Any person in control or possession of such vehicle who violates the provisions of this section shall be subject to arrest and fine of not less than fifty dollars nor more than two hundred dollars for each offense.

28-4. No vehicle shall be licensed as a public passenger vehicle until it has been inspected under the direction of the commissioner and found to be in safe operating condition and to have adequate body and seating facilities which are clean and in good repair for the comfort and convenience of passengers.

28-4.1. No vehicle shall be licensed as a livery vehicle or taxicab unless it has two doors on each side, and no vehicle having seating capacity for more than seven passengers shall be licensed as a public passenger vehicle unless it has at least three doors on each side or fixed aisle space for passage to doors.

28-5. Application for public passenger vehicle licenses shall be made in writing signed and sworn to by the applicant upon forms provided by the commissioner. The application shall contain the full name and Chicago street address of the applicant, the manufacturer's name, model, length of time in use, horse power and seating capacity of the vehicle applicant will use if a license is issued, and the class of public passenger vehicle license requested. The commissioner shall cause each application to be stamped with the time and date of its receipt. The applicant shall submit a statement of his assets and liabilities with his application.

28-6. Upon receipt of an application for a public passenger vehicle license the commissioner shall cause an investigation to be made of the character and reputation of the applicant as a law abiding citizen; the financial ability of the applicant to render safe and comfortable transportation service, to maintain or replace the equip-

ment for such service and to pay all judgments and awards which may be rendered for any cause arising out of the operation of a public passenger vehicle during the license period. If the commissioner shall find that the applicant is qualified and that the vehicle for which a license is applied for is in safe and proper condition as provided in this chapter, the commissioner shall issue a public passenger vehicle license to the owner of the vehicle for the license period ending on the thirty-first day of December following the date of its issuance, subject to payment of the public passenger vehicle license fee for the current year.

28-7. The annual fee for each public passenger vehicle license of the class herein set forth is as follows:

Livery vehicle	$ 25.00
Sightseeing vehicle	125.00
Taxicab	40.00
Terminal vehicle	25.00

Said fee shall be paid in advance when the license is issued and shall be applied to the cost of issuing such license, including, without being limited to, the investigations, inspections and supervision necessary therefor, and to the cost of regulating all operations of public passenger vehicles as provided in this chapter.

Nothing in this section shall affect the right of the city to impose or collect a vehicle tax and any occupational tax, as authorized by the laws of the state of Illinois, in addition to the license fee herein provided.

28-8. All licenses for public passenger vehicles issued for the year 1951, which have not been revoked or surrendered prior to the time when such licenses for the year 1952 shall have been issued, may be renewed from year to year, subject to the provisions of this chapter.

28-9. No public passenger vehicle license shall be subject to voluntary assignment or transfer by operation of law, except in the event of the licensee's induction or recall into the armed forces of the United States for active duty or in the event of the licensee's death. In case of death the assignment shall be made by the legal represen-

tatives of his estate. No assignment shall be effective until the assignee shall have filed application for a license and is found to be qualified as provided in sections 28-5 and 28-6. If qualified the license shall be transferred to him by the commissioner, subject to payment of a transfer fee of $50.00, the assumption by the assignee of all liabilities for loss or damage resulting from any occurrence arising out of or caused by the operation or use of the licensed public passenger vehicle before the effective date of the transfer and the approval by the commissioner of the insurance to be furnished by the busman, cabman or coachman as required by section 28-12.

It is unlawful for any busman, cabman or coachman to lease or loan a licensed public passenger vehicle for operation by any person for transportation of passengers for hire within the city. No person other than a chauffeur, who is either the busman, cabman or coachman or one hired by the busman, cabman or coachman to drive such vehicle as his agent or employee, in the manner prescribed by the busman, cabman or coachman, shall operate such vehicle for the transportation of passengers for hire within the city.

There shall be no discrimination by any busman, cabman or coachman against any person employed or seeking employment as a chauffeur with respect to hire, promotion, tenure, terms, conditions and privileges of employment on account of race, color, religion, national origin or ancestry.

28-10. The commissioner shall deliver with each license a sticker license emblem which shall bear the words "Public Vehicle License" and "Chicago" and the numerals designating the year for which such license is issued, a reproduction of the corporate seal of the city, the names of the mayor and the commissioner and serial number identical with the number of the public vehicle license. The predominant back-ground colors of such sticker license emblems shall be different from the vehicle tax emblem for the same year and shall be changed annually. The busman, cabman or coachman shall affix, or cause to be affixed, said sticker emblem on the inside of the glass part of the windshield of said vehicle.

28-11. In addition to the license and sticker emblem the commissioner shall deliver a license card for each vehicle. Said card shall contain the name of the busman, cabman or coachman, the license of the vehicle and the date of inspection therof. It shall be signed by the commissioner and shall contain blank spaces upon which entries of the date of every inspection of the vehicle and such other entries as may be required shall be made. It shall be of different color each year. A suitable frame with glass cover shall be provided and affixed on the inside of the vehicle in a conspicuous place and in such manner as may be determined by the commissioner for insertion and removal of the public passenger vehicle license card; and in every livery vehicle and taxicab said frame shall also be provided for insertion and removal of the chauffeur's license card and such other notice as may be required by the provisions of this chapter and the rules of the commissioner. It is unlawful to carry any passenger or his baggage unless the license cards are exposed in the frame as provided in this section.

28-12. Every busman, cabman or coachman shall carry public liability and property damage insurance and workmen's compensation insurance for his employees with solvent and responsible insurers approved by the commissioner, authorized to transact such insurance business in the state of Illinois, and qualified to assume the risk for the amounts hereinafter set forth under the laws of Illinois, to secure payment of any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the busman's, cabman's or coachman's public passenger vehicles.

The public liability insurance policy or contract may cover one or more public passenger vehicles, but each vehicle shall be insured for the sum of at least five thousand dollars for property damage and fifty thousand dollars for injuries to or death of any one person and each vehicle having seating capacity for not more than seven adult passengers shall be insured for the sum of at least one hundred thousand dollars for injuries to or death of more than one person in any one accident. Each vehicle having seating capacity for more than seven adult passen-

gers shall be insured for injuries to or death of more than one person in any one accident for at least five thousand dollars more for each such additional passenger capacity. Every insurance policy or contract for such insurance shall provide for the payment and satisfaction of any final judgment rendered against the busman, cabman or coachman and person insured, or any person driving any insured vehicle, and that suit may be brought in any court of competent jurisdiction upon such policy or contract by any person having claims arising from the operation or use of such vehicle. It shall contain a description of each public passenger vehicle insured, manufacturer's name and number, the state license number and the public passenger vehicle license number.

In lieu of an insurance policy or contract a surety bond or bonds with a corporate surety or sureties authorized to do business under the laws of Illinois, may be accepted by the commissioner for all or any part of such insurance, provided that each bond shall be conditioned for the payment and satisfaction of any final judgment in conformity with the provisions of an insurance policy required by this section.

All insurance policies or contracts or surety bonds required by this section, or copies thereof certified by the insurers or sureties, shall be filed with the commissioner and no insurance or bond shall be subject to cancellation except on thirty days' previous notice to the commissioner. If any insurance or bond is cancelled or permitted to lapse for any reason, the commissioner shall suspend the license for the vehicle affected for a period not to exceed thirty days, to permit other insurance or bond to be supplied in compliance with the provisions of this section. If such other insurance or bond is not supplied, within the period of suspension of the license, the mayor shall revoke the license for such vehicle.

28-13. All judgments and awards rendered by any court or commission of competent jurisdiction for loss or damage in the operation or use of any public passenger vehicle shall be paid by the busman, cabman or coachman within ninety days after they shall become final and not stayed

by supersedeas. This obligation is absolute and not contingent upon the collection of any indemnity from insurance.

28-14. If any public passenger vehicle shall become unsafe for operation or if its body or seating facilities shall be so damaged, deteriorated or unclean as to render said vehicle unfit for public use, the license therefor shall be suspended by the commission until the vehicle shall be made safe for operation and its body shall be repaired and painted and its seating facilities shall be reconditioned or replaced as directed by the commissioner. In determining whether any public passenger vehicle in unfit for public use the commissioner shall give consideration to its effect on the health, comfort and convenience of pasgers and its public appearance on the streets of the city.

Upon suspension of a license for any cause, under the provisions of this chapter, the license sticker emblem shall be removed by the commissioner from the windshield of the vehicle and an entry of the suspension shall be made on the license card. If the suspension is terminated an entry thereof shall be made on the license card by the commissioner and a duplicate license sticker shall be furnished by the commissioner for a fee of one dollar. The commissioner shall notify the department of police of every suspension and termination of suspension.

28-15. If any summons or subpoena issued by a court or commission cannot be served upon the busman, cabman or coachman at his last Chicago address recorded in the office of the commission within sixty days after such process is delivered to the person authorized to serve it, and the busman, cabman, or coachman fails to appear in answer to such process for want of service, or if any busman, cabman or coachman shall refuse or fail to pay any judgment or award as provided in section 28-13, or shall lease or loan any of his licensed public passenger vehicles for operation by any person for hire or shall be convicted of a felony or any criminal offense involving moral turpitude, the mayor shall revoke all public vehicle licenses held by him.

If any public passenger vehicle license was obtained by application in which any material fact was omitted or

stated falsely, or if any public passenger vehicle is operated in violation of the provisions of this chapter for which revocation of the license is not mandatory, or if any public passenger vehicle is operated in violation of the rules and regulations of the commissioner relating to the administration and enforcement of the provisions of this chapter, the commissioner may recommend to the mayor that the public passenger vehicle license therefor be revoked and the mayor, in his discretion, may revoke said license.

Upon revocation of any license, the commissioner shall remove the license sticker emblem and the license card from the vehicle affected.

28-16. Every busman, cabman or coachman shall deliver or submit his public passenger vehicles for inspection or the performance of any other duty by the commissioner upon demand. It is unlawful for any person to interfere with or hinder or prevent the commissioner from discharging any duty in the enforcement of this chapter.

28-17. It is unlawful to permit more than one passenger to occupy the front seat with the chauffeur in any public passenger vehicle.

28-18. It is the duty of every busman, cabman or coachman to notify the commissioner whenever any change in his Chicago address is made. Any notice required to be given to the busman, cabman or coachman shall be sufficient if addressed to the last Chicago address recorded in the office of the commissioner.

28-19. No person shall be qualified for a livery vehicle license and a taxicab license at the same time; nor shall any person having a livery vehicle license be associated with anyone for sending or receiving calls for taxicab service.

No license for any livery vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing, the commissioner shall determine that public convenience and necessity require additional

livery service and shall recommend to the council the maximum number of such licenses to be authorized by ordinance.

Not more than six passengers shall be accepted for transportation in a livery vehicle on any trip.

28-19.1. It is unlawful for any person to operate or drive a livery vehicle equipped with a meter which registers a charge or fare or indicates the distance traveled by which the charge or fare to be paid by a passenger is measured.

28-19.2. It in unlawful for any person to solicit passengers for transportation in a livery vehicle on any public way. No such vehicle shall be parked on any public way for a time longer than is reasonably necessary to accept passengers in answer to a call for service and no passengers shall be accepted for any trip in such vehicle without previous engagement for such trip, at a fixed charge or fare, through the station or office from which said vehicle is operated.

28-20. It is unlawful for the cabman of any livery vehicle, or the station from which it is operated to use the word "taxi", "taxicab" or "cab" in connection with or as part of the name of the cabman or his trade name.

The outside of the body of each livery vehicle shall be uniform black, blue or blue-black color. No light fixtures or lights shall be attached to or exposed so as to be visible outside of any livery vehicle, except such as are required by the law of the state of Illinois regulating traffic by motor vehicles and one rear red light in addition to those required by said law. No name, number or advertisement of any kind, excepting official license emblems or plates, shall be painted or carried so as to be visible outside of any livery vehicle.

It is unlawful for any person to hold himself out to the public by advertisement, or otherwise, to render any livery service unless he is the cabman of a licensed livery vehicle.

28-21. Sightseeing vehicles shall not be used for transportation of passengers for hire except on sightseeing tours or chartered trips. Passengers for sightseeing tours

shall not be solicited upon any public way except at bus stands specially designated by the council for sightseeing vehicles.

It is unlawful for any cabman or coachman to advertise his public passenger vehicle for hire on sightseeing tours.

28-22. Every taxicab shall be operated regularly to the extent reasonably necessary to meet the public demand for service. If the service of any taxicab is discontinued for any reason except on account of strike, act of God or cause beyond the control of the cabman, the commissioner may give written notice to the cabman to restore the taxicab to service, and if it is not restored within five days after notice, the commissioner may recommend to the mayor that the taxicab license be revoked and the mayor, in his discretion, may revoke same.

28-22.1. Not more than 3761 taxicab licenses shall be issued unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional taxicab service and shall recommend the number of taxicab licenses which may be issued. Notice of such hearing stating the time and place thereof shall be published in the official newspaper of the city at least twenty days prior to the hearing and by mailing a copy thereof to all taxicab licensees. At such hearing any licensee, in person or by attorney, shall have the right to cross-examine witnesses and to introduce evidence pertinent to the subject. At any time and place fixed for such hearing it may be adjourned to another time and place without further notice.

In determining whether public convenience and necessity require additional taxicab service, due consideration shall be given to the following:

1. The public demand for taxicab service;
2. The effect of an increase in the number of taxicabs on the safety of existing vehicular and pedestrian traffic;
3. The effect of increased competition,
   (a) on revenues of taxicab licensees;

(b) on cost of rendering taxicab service, including provisions for proper reserves and a fair return on investment in property devoted to such service;

(c) on the wages or compensation, hours and conditions of service of taxicab chauffeurs;

4. The effect of a reduction, if any, in the level of net revenues to taxicab licensees on reasonable rates of fare for taxicab service;

5. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional taxicab service, the council, by ordinance, may fix the maximum number of taxicab licenses to be issued, not to exceed the number recommended by the commissioner.

28-23. Every taxicab shall have the cabman's name, telephone number and the public passenger vehicle license number plainly painted in plain Gothic letters and figures of three-eighth inch stroke and at least two inches in height in the center of the main panel of the rear doors of said vehicle. In lieu of the cabman's telephone number the name and telephone number of any corporation or association with which the cabman is affiliated may be painted in the same manner, provided such corporation or association shall have assumed equal liability with the cabman for any loss or damage resulting from any occurrence arising out of or caused by the operation or use of any of the cabman's taxicabs and shall carry and furnish to the commissioner public liability and property damage insurance to secure payment of such loss or damage as provided in section 28-12. The public vehicle license number assigned to any taxicab shall be assigned to the same vehicle or to any vehicle substituted therefor upon annual renewal of the license. No other name, number or advertisement of any kind, excepting signs required by this chapter, official license emblems or plates and a trade emblem, in a manner approved by the commissioner, shall be painted or carried so as to be visible on the outside of any taxicab.

28-24. Every taxicab shall be equipped with a taximeter connected with and operated from the transmission of the taxicab to which it is attached. The taximeter shall be equipped with a flag at least three inches by two inches in size. The flag shall be plainly visible from the street and shall be kept up when the taxicab is for hire and shall be kept down when it is engaged.

Taximeters shall have a dial or dials to register the tariff in accordance with the lawful rates and charges. The dial shall be in plain view of the passenger while riding and between sunset and sunrise the dial shall be lighted to enable the passenger to read it.

It is unlawful to operate a taxicab for hire within the city unless the taximeter attached thereto has been sealed by the commission.

28-25. At the time a taxicab license is issued and semi-annually thereafter the taximeter shall be inspected and tested by the commissioner to determine if it complies with the specifications of this chapter and accurately registers the lawful rates and charges. If it is in proper condition for use, the taximeter shall be sealed and a written certificate of inspection shall be issued by the commissioner to the cabman. Upon complaint by any person that a taximeter is out of working order or does not accurately register the lawful rates and charges it shall be again inspected and tested and, if found to be in improper working condition or inaccurate, it shall be unlawful to operate the taxicab to which it is attached until it is equipped with a taximeter which has been inspected and tested by the commissioner, found to be in proper condition, sealed and a written certificate of inspection therefor is issued.

The cabman or person in control or possession of any taxicab shall deliver it with the taximeter attached or deliver the taximeter detached from the taxicab for inspection and test as requested by the commissioner. The cabman may be present or represented when such inspection and test is made.

28-26. It is unlawful for any person to tamper with, mutilate or break any taximeter or the seal thereof or to

transfer a taximeter from one taxicab to another for use in transportation of passengers for hire before delivery of the taxicab with a transferred taximeter for inspection test and certification by the commissioner as provided in section 28-25.

28-27. The fee for each certificate of inspection shall be three dollars, but no charge shall be made for any certificate when the inspection and test is made upon complaint, and it is found that the taximeter is in proper working condition and accurately registers the lawful rates and charges.

28-28. It is unlawful to refuse any person transportation to any place within the city in any taxicab which is unoccupied by a passenger for hire unless it is on its way to pick up a passenger in answer to a call for service or it is out of service for any other reason. When any taxicab in answering a call for service or is otherwise out of service it shall not be parked at a cabstand, and no roof light or other special light shall be used to indicate that the vehicle is vacant or subject to hire. A white card bearing the words "Not For Hire" printed in black letters not less than two inches in height shall be displayed on the windshield of such taxicab.

28-29. Group riding is prohibited in taxicabs, except as directed by the passenger first engaging the taxicab. Not more than five passengers shall be accepted for transportation on any trip; provided that additional passengers under twelve years of age accompanied by an adult passenger shall be accepted if the taxicab has seating capacity for them.

28-29.1. No passenger shall be permitted to ride on the front seat with the chauffeur of the taxicab unless all other seats are occupied.

28-30. Rates of fare for taxicabs shall be as follows:

For the first one-quarter of a mile or fraction thereof for one person .....25 cents

For each additional one-half of a mile or fraction thereof for one person .....10 cents

For each additional person of twelve years or more for the whole trip .....10 cents
For each three minutes of waiting time or fraction thereof .....10 cents

Waiting time shall include the time beginning three minutes after call time at the place to which the taxicab has been called when it is not in motion, the time consumed by unavoidable delays at street intersections, bridges or elsewhere and the time consumed while standing at the direction of a passenger.

Every passenger under twelve years of age when accompanied by an adult shall be carried without charge.

Ordinary hand baggage of passengers shall be carried without charge. A fee of twenty-five cents may be charged for carrying a trunk, but no trunk shall be carried except inside of the taxicab.

Immediately on arrival at the passenger's destination it shall be the duty of the chauffeur to throw the taximeter lever to the non-recording position and to call the passenger's attention to the fare registered.

It is unlawful for any person to demand or collect any fare for taxicab service which is more or less than the rates established by the foregoing schedule, or for any passenger to refuse payment of the fare so registered.

28-31. Terminal vehicles shall not be used for transportation of passengers for hire except *from railroad terminal stations and steamship docks* to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan.

28-31.1. No license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed unless, after a public hearing held in the same manner as specified for hearings in Section 28-22.1, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued.

In determining whether public convenience and necessity require additional terminal vehicle service due consideration shall be given to the following:

1. The public demand for such service;
2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation;
3. The effect of an increase in the number of such vehicles upon the ability of the licensee to continue rendering the required service at reasonable fares and charges to provide revenue sufficient to pay for all costs of such service, including fair and equitable wages and compensation for licensee's employees and a fair return on the investment in property devoted to such service;
4. Any other facts which the commissioner may deem relevant.

If the commissioner shall report that public convenience and necessity require additional terminal vehicle service, the council, by ordinance, may fix the maximum number of terminal vehicle licenses to be issued not to exceed the number recommended by the commissioner.

28-31-2. The rate of fare for local transportation of every passenger in terminal vehicles of the licensee shall be uniform, regardless of the distance traveled; provided that children under 12 years of age, when accompanied by an adult, shall be carried at not more than half fare. Such rates of fare shall be posted in a conspicuous place or places within each vehicle as determined by the commissioner.

28-32. Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than $5.00 nor more than $100.00 for the first offense, not less than $25.00 nor more than $100.00 for the second offense during the same calendar year, and not less than $50.00 nor more than $100.00 for the third and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

APPENDIX B.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 11692 SEPTEMBER TERM, 1956, SEPTEMBER SESSION, 1956

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY, et al.,
Plaintiffs-Appellants,
v.
CITY OF CHICAGO, a municipal corporation, et al.,
Defendants-Appellees,
and
PARMELEE TRANSPORTATION COMPANY,
Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 17, 1957

Before MAJOR, SWAIM and SCHNACKENBERG, *Circuit Judges.*

SCHNACKENBERG, *Circuit Judge.* Twenty-one railroads, herein sometimes referred to as Terminal Lines, and Rail

[1] The Atchison, Topeka and Santa Fe Railway Company; The Baltimore and Ohio Railroad Company; The Chesapeake and Ohio Railway Company; Chicago, Burlington & Quincy Railroad Company; Chicago & Eastern Illinois Railroad Company; Chicago Great Western Railway Company; Chicago, Indianapolis and Louisville Railway Company; Chicago Milwaukee, St Paul & Pacific Railroad Company; Chicago North Shore and Milwaukee Railway; Chicago and North Western Railway Company; Chicago, Rock Island & Pacific Railroad Company; Chicago South Shore and South Bend Railroad; Erie Railroad Company; Grand Trunk Western Railroad Company; Gulf, Mobile and Ohio Railroad Company; Illinois Central Railroad Company; Minneapolis, St. Paul & Sault Ste. Marie Railroad Company; The New York Central Railroad Company; The New York, Chicago and St. Louis Railroad Company; The Pennsylvania Railroad Company; and the Wabash Railroad Company.

road Transfer Service, Inc., sometimes herein referred to as Transfer, on October 24, 1955 brought an action in the district court against defendant City of Chicago, sometimes herein referred to as the city, and certain officials thereof.[2] Plaintiffs' complaint seeks a declaratory judgment and injunctive relief against the enforcement against them of an ordinance known as chapter 28 of the municipal code of Chicago, as amended by an ordinance enacted July 26, 1955. Plaintiffs asked the district court to declare by its judgment, *inter alia*, that the ordinance, as amended in 1955, is void as applied to them.

Parmelee Transportation Company, sometimes herein referred to as Parmelee, on its petition was granted leave to intervene as a defendant.[3]

On motion of defendants, other than Parmelee, pursuant to rule 56 of the federal rules of civil procedure,[4] and on the pleadings, affidavits and exhibits submitted by all parties, the district court on January 12, 1956 granted a summary judgment against plaintiffs and dismissed their action.[5] 136 F. Supp. 476. From said judgment this appeal was taken.[6]

The undisputed facts we now set forth.

There are eight passenger terminals in downtown Chicago, each being used by from one to six railroads. No one railroad passes through Chicago, but about 3900 railroad passengers daily travel through Chicago on continuous journeys which begin and end at points outside Chicago. At Chicago, they transfer from an incoming, to an outgoing, railroad. The only practical method of transferring

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[2] Richard J. Daley, as mayor; John C. Melaniphy, as acting corporation counsel; Timothy P. O'Connor, as commissioner of police; and William P. Flynn, as public license commissioner.

[3] The district court considered the petition as an answer to the complaint.

[4] Fed. Rules of Civil Procedure, rule 56, 28 U.S.C.A.

[5] On the same day the district court filed "findings of fact" and "conclusions of law", one conclusion being that there is no genuine issue of fact involved in this controversy.

[6] On January 13, 1956 the district court ordered that defendants, other than Parmelee, be enjoined from enforcing the ordinance in question against plaintiffs upon the latter filing supersedeas bond of $50,000. It is our understanding that this bond was filed.

these passengers between the different terminal stations is by motor vehicle equipped to carry them and their hand baggage simultaneously. More than 99 per cent of the passengers so transferred between terminal stations are traveling on through tickets between points of origin and destination located in different states. They are carried over public ways of the city.

Transfer began its operations on October 1, 1955, but has not applied to the city for public passenger terminal vehicle licenses. These transfer operations are required by a tariff filed with the Interstate Commerce Commission.[7] They have been provided for by tariffs for more than the past forty years.

Pursuant to such tariffs a passenger traveling through Chicago purchases at his point of origin a railroad ticket composed of a series of coupons covering his complete transportation to his destination. If his through journey requires him to transfer from one railroad passenger terminal in Chicago to another, a part of his ticket consists of a coupon good for the transfer of himself and his hand baggage between such terminals. The expense of the required transfer service is absorbed by the railroads.

The tariffs provide that any such required transfer service shall be without additional charge where a one-way fare from Chicago to destination would be more than a specified minimum sum. Where such fare would be less

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[7] Local and Joint Passenger Tariff No. 3 governing, *inter alia*, passengers and baggage transfer between stations in Chicago, was filed with the Interstate Commerce Commission on behalf of Terminal Lines. On page 11 of said tariff, in Section 2 thereof, the Terminal Lines are listed according to the Chicago stations which they enter and it is set forth in Section 2 thereof that transfer is required between all railroad stations when transfer is necessary, and in Column 4 appears "Passenger transfer included", while in Column 5 there appears "Transfer of all baggage included".

Page 5 of said tariff in Section 1 thereof provides in rule 4, in part, as follows:

"Through Transportation. (a) Where it is designated in Column 4 Section 2, that passenger transfer is included, transfer coupon must be included in through ticket without additional collection."

And rule 6 in Section 1, in part, provides:

"Through Transportation. (a) Where it is designated in Column 5 Section 2, that baggage transfer is included, baggage may be checked through without additional collection."

than such minimum, a fixed charge which varies with the fare must be added to cover the required transfer service.

Prior to October 1, 1955, there had existed for many years arrangements between the Terminal Lines and Parmelee whereby it furnished this service for coupon-holding passengers. On June 13, 1955, the Terminal Lines ended their arrangement with Parmelee effective September 30, 1955. Under date of October 1, 1955, the Terminal Lines and Transfer executed a contract. In brief, this contract [8] provides that, upon delivery of a transfer coupon to Transfer by a through-passenger, it will carry him and his hand baggage from the incoming to the appropriate outgoing station without charge. Transfer is compensated by the outgoing terminal railroad. Transfer is given the exclusive right to perform this transfer service. Transfer devotes its vehicles exclusively to service under the contract.[9]

On and prior to June 13, 1955, there was in effect an ordinance of the city, being said chapter 28 of the municipal code, consisting of sections 28-1 to 28-32,[10] for the regulation of "Public Passenger Vehicles." Section 28-1 contained the following definitions, *inter alia*:

> "'Public passenger vehicle' means a motor vehicle, as defined in the Motor Vehicle Law of the State of Illinois, which is used for the transportation of passengers for hire, excepting those devoted exclusively for funeral use or in operation of a metropolitan transit authority or public utility under the laws of Illinois."
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> * * * *
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> "'Terminal vehicle' means a public passenger vehicle which is operated under contracts with railroad

[8] On or about September 19, 1955, the railroads filed copies of the contract with the Interstate Commerce Commission and with the Illinois Commerce Commission.

[9] The contract also provides that Transfer shall perform certain additional baggage transfer services for Terminal Lines. The transfer of a passenger's *checked* baggage by Transfer in vehicles other than "terminal vehicles", although covered by terms of the contract between Terminal Lines and Transfer, as well as actually performed by Parmelee prior to October 1, 1955, is not involved in this case.

[10] Herein sometimes referred to as the prior ordinance.

and steamship companies, exclusively for the transfer of passengers from terminal stations."

Section 28-31 provided:

"28-31. No person shall be qualified for a terminal vehicle license unless he has a contract with one or more railroad or steamship companies for the transportation of their passengers from terminal stations.

"It is unlawful to operate a terminal vehicle for the transportation of passengers for hire except for their transfer from terminal stations to destinations in the area bounded on the north by E. and W. Ohio Street; on the west by N. and S. Desplaines Street; on the south by E. and W. Roosevelt Road; and on the east by Lake Michigan."

Certain other parts of chapter 28 incorporated regulations enacted pursuant to the police power of the city.[11]

Parmelee was, on and prior to September 30, 1955, the only person having a transfer contract with the Terminal Lines and licensed to operate terminal vehicles under the ordinance.

At a meeting of the committee on local transportation of the Chicago city council held on July 21, 1955, the chairman stated that recently he had been advised by the Vehicle License Commissioner that he had received a communication from Parmelee advising that its contract with the railroads was to be canceled out in September of that year, "which would make it appear that the railroads were taking the position of dictating who would or could operate terminal vehicles in Chicago; that he did not think that was right and had prepared an ordinance with the assistance of Mr. Gross, and had it introduced in the city council and referred it to the committee; that subsequently he had discussed said ordinance with Mr. Grossman of

[11] These are provisions for granting and suspension of licenses, safety regulations based on the type of vehicle, number of passengers permitted, condition and maintenance of vehicles, inspection thereof, etc., financial responsibility of operators, investigation of character of prospective licensees and continuing supervision thereof, requirements for maintenance of adequate insurance, determination of public convenience and necessity with respect to number of certain intrastate vehicles, i.e. livery and taxicabs, which are to be permitted on the city streets, and regulation of taxi fares through meters.

the corporation counsel's office and that, as a result of his conference with Mr. Grossman, it would appear that, while he was on the right track in the matter, his method of approach was wrong."

Mr. Grossman informed the committee that he had looked over the ordinance "as introduced" by the chairman and was of the opinion that it was not in proper form; but that he believed the objective could be obtained in some other way. He said he would endeavor to prepare and submit an ordinance on this subject.

The chairman's proposed ordinance, which met with Mr. Grossman's objection as to form, and which was laid aside, in brief would have granted an exclusive franchise for ten years to Parnelee for the operation of terminal vehicles to transfer passengers and their baggage between railroad stations.[12]

On July 26, 1955, the chairman stated that the committee was in session to receive a report from Mr. Grossman who had prepared a substitute ordinance which would accomplish what the committee had in mind, namely, placing the licensing and operation of terminal vehicles under the complete control of the city of Chicago, whereas, as the code then provided, the only one who could secure a license for the operation of a terminal vehicle was someone who had a contract with the railroads.

On recommendation of the committee, the council on the same day passed the ordinance now under attack.[13]

1. The city and Parnelee concede that Transfer is engaged in interstate commerce. In *United States* v. *Yellow*

[12] §2 read: "Subject to all the conditions of this ordinance, exclusive permission and authority is hereby granted to the licensee to operate terminal vehicles in the City for a period of ten (10) years, commencing on . . . . , 1955, and ending on . . . . , 1965."

§4 provided: "It is unlawful for any person to be an operator of one or more terminal vehicles on any public way from place to place within the corporate limits of the city unless such terminal vehicles are licensed by the City as terminal vehicles. * * * "

§11 provided: "Upon the effective date of this ordinance, the commissioner shall issue licenses hereunder to licensee in not to exceed the number of licenses held by such licensee on April 1, 1955. * * * "

[13] Herein sometimes referred to as the 1955 ordinance.

Appellees attempt to distinguish the case of *Frost* v. *Corporation Commission*, 278 U. S. 515 (1929) and *Alton Railroad* v. *United States*, 315 U. S. 15 (1942) on the slim ground that there is here involved only a "license" and not a "franchise". As Judge Biggs said in *Seatrain Lines* v. *United States*, 64 F. Supp. 156 (D. Del., 1946), "Whether the certificate when issued be called a "franchise" or not is relatively unimportant. Whatever be its name, it is a creature of the statute."

The case of *Chicago* v. *Chicago Rapid Transit Co.*, 284 U. S. 577 (1931) is, of course, inapposite. The standing of the City of Chicago to appeal in that case was dismissed on the oft-repeated doctrine that municipal corporations, created by the state for the better ordering of government and being subject to abolition by the state at any time, have no privileges or immunities under the federal Constitution which they may invoke in opposition to the will of the state. *Pawhuska* v. *Pawhuska Oil & Gas Co.*, 250 U. S. 394 (1919). The other cases offered by the appellees in support of their position (see Motion to Dismiss or Affirm, p. 3) are concerned with the right of a utility to attack the constitutionality of a legislative or administrative act of the government which would create or authorize competition with the attacking utility. It is not the appellant, here, but the appellees which have attacked the government's action as unconstitutional. The appellant is not contending for any right to be free from competition or from the regulations imposed by the ordinance, it is urging only that it has a right to require that the competition fulfill the same requirements which are imposed by what is manifestly a valid municipal ordinance.

There are several judicially created doctrines for the purpose of avoiding constitutional questions, of which one is the stringent requirement as to the status of a party

Cab Co., 332 U.S. 218, 228, Parmelee's operation (including that part now being carried on by Transfer) was held to be an integral step in an interstate movement and, therefore, a constituent part of interstate commerce.[14] The court pointed out that Chicago is the terminus of a large number of railroads engaged in interstate passenger traffic and that a great majority of the persons making interstate railroad trips which carry them through Chicago must disembark from a train at one railroad station, travel from that station to another some two blocks to two miles distant, and board another train at the latter station; that Parmelee had contracted with the railroads to provide this transportation by special cabs carrying seven to ten passengers. The court said that Parmelee's contracts were exclusive in nature, adding:

> "The transportation of such passengers and their luggage between stations in Chicago is clearly a part of the stream of interstate commerce. When persons or goods move from a point of origin in one state to a point of destination in another, the fact that a part of that journey consists of transportation by an independent agency solely within the boundaries of one state does not make that portion of the trip any less interstate in character. *The Daniel Ball*, 10 Wall. 557, 565. That portion must be viewed in its relation to the entire journey rather than in isolation. So viewed, it is an integral step in the interstate movement. See *Stafford* v. *Wallace*, 258 U.S. 495.
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> "Any attempt to monopolize or to impose an undue restraint on such a constituent part of interstate commerce brings the Sherman Act into operation. * * *"

Obviously these holdings conform with the following well-established principles: (1) a state may not obstruct or lay a direct burden on the privilege of engaging in interstate commerce, *Furst* v. *Brewster*, 282 U.S. 493, 498; *Mich. Com.* v. *Duke*, 266 U.S. 570, 577, 69 L. ed. 445; but (2) nevertheless it may incidently and indirectly affect it

[14] The destination intended by the passenger when he begins his journey and known to the carrier, determines the character of the commerce, whether interstate or not. *Sprout* v. *South Bend*, 277 U.S. 163, 168.

to attack the validity of a statute, ordinance, or administrative regulation. That policy is expressed in the cases cited by the appellees. Obviously that policy should not be given any weight in considering the standing of the appellant to protect its economic interests by the maintenance of an appeal in which it is seeking to assert the validity of governmental action, not the opposite.

II.

IRRESPECTIVE OF HOW MUCH OF THE ORDINANCE WAS HELD INVALID BY THE COURT OF APPEALS ITS DECISION WAS ERRONEOUS AND IN CONFLICT WITH THE DECISIONS OF THIS COURT.

We quite agree with the appellees that there is room for doubt and difference of opinion as to the scope of the ruling of the Court of Appeals that the ordinance in question was unconstitutional. This, however, is a consideration calling for the exercise of this Court's reviewing power not for abstention from review. In our petition for rehearing in the Court of Appeals, we pointed out that the very language of the Court of Appeals which is quoted at page 5 of Appellees' Motion to Dismiss or Affirm "interjects great uncertainty and confusion in the judgment of the Court." We were unsure then, as we are unsure now, precisely to what extent the Court of Appeals meant to invalidate the ordinance. However, our statement that the Court of Appeals has "stricken down the City's plan for regulating terminal vehicles in the interest of public safety and welfare" is amply supported. Appellees sought a declaration that Chapter 28 of the Municipal Code of Chicago was void as applied to them. They sought also an injunction restraining the City from enforcing the ordinance as a whole against them. (Tr. p. 22.) The District Court denied relief. The Court of Appeals reversed. Transfer

by a bona fide, legitimate, and reasonable exercise of its police power. 15 C.J. S. 266. In *Dahnke-Walker Co.* v. *Bondurant*, 257 U.S. 282, 290, the court said:

> "The commerce clause of the Constitution, Art. I, §8, cl. 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. * * *"

The power here referred to may be exercised, not only in an act of Congress, but also in a regulation by the Interstate Commerce Commission. 15 C.J.S. 274.

Part I of the Interstate Commerce Act [15] deals with railroads as well as other subjects not relevant here. §3 (3) thereof, in its presently pertinent provisions, appeared in the original act of February 4, 1887.[16] It provides that all carriers of passengers subject to the act shall afford all reasonable facilities for the interchange of traffic between their respective lines and for the receiving, forwarding and delivering of passengers to and from connecting lines.[17] *Central Transfer Co.* v. *Terminal R. R.*, 288 U.S. 469, 473, note 1.

Part II of the same act [18] deals with motor carriers. As amended in 1940, 302(c) [19] provides as follows:

> §202(c) "Notwithstanding any provision of this section or of section 203; the provisions of this part, [Part II], except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

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[15] 49 U.S.C.A. §§1-27.

[16] §3, second unnumbered paragraph, 24 Stat. 380.

[17] There is no warrant for limiting the meaning of "connecting lines" to those having a direct physical connection. The term is commonly used as referring to all the lines making up a through route. *Atlantic Coast Line R. Co.* v. *U. S.*, 284 U.S. 278, 293.

[18] 49 U.S.C.A. §§301-327, (1951 ed.).

[19] 56 Stat. 300, where this section is known as section 202(c).

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, * * * incidental to transportation or service subject * * * [thereto] in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad * * *;

"(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, * * * in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier * * * as part of, and shall be regulated in the same manner as, the transportation by railroad, * * * to which such services are incidental."

In Part I, §6(1) of the Interstate Commerce Act[20] requires every common carrier to file with the commission tariffs (therein referred to as schedules), for transportation, including joint rates over through routes. In this respect a tariff is to be treated the same as a statute. *Pennsylvania R. Co.* v. *International Coal Min. Co.*, 230 U.S. 183, at 197, 57 L. ed. 1446, 1451.

Relevant tariffs were filed with the Interstate Commerce Commission on behalf of the Terminal Lines.

The agreement of October 1, 1955[21] obligates Transfer to perform all the required passenger and hand baggage transfer service from the terminal station in Chicago of each incoming line to the terminal station in Chicago of each outgoing line, all at the expense of the latter, for the period beginning October 1, 1955 and ending September 30, 1960. This service (which has been since October 1, 1955 performed by Transfer) replaced the Parmelee service, with the exception of two types of operations local

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[20] 49 U.S.C.A. §6(1).

[21] The Baltimore and Ohio Chicago Terminal Railroad Company; Chicago and Western Indiana Railroad Company and Chicago Union Station Company, therein referred to as "depot companies", are also parties to said agreement. That fact is not controlling in the decision of this case.

in their nature,[22] consisting of (a) transportation of friends or relatives accompanying a coupon holder between stations, and (b) transportation of a coupon holder to any hotel or other terminus "in the loop district of Chicago", as requested of the driver by the coupon holder.

2. We conclude that Transfer is an instrumentality used by Terminal Lines in interstate commerce and is subject to control of the federal government. We also conclude that the city can neither give nor take away such authority of Transfer to operate and that the city has no power of control over Transfer, except the control which it has generally in exercising its police power pertaining to such matters as public safety, maintenance of streets and the convenient operation of traffic. For a more detailed statement of the scope of such police power, see *Continental Baking Co.* v. *Woodring*, 286 U.S. 352.

This is not a case in which a motor vehicle operator is denied the privilege of operating on a particular highway because of the congestion of traffic thereon, such as was true in *Bradley* v. *Public Utility Commission*, 289 U.S. 92, (on which, for some reason not clear to us, the city relies), but rather we have a case where an ordinance, in effect, bars Transfer from the entire network of highways within the downtown area of Chicago.

Pursuant to federal law, Terminal Lines have assumed an obligation to furnish the service in question as an interstation link in interstate commerce. The integration of this service with the complex, and occasionally changing, schedules of the Terminal Lines and the ebb and flow of passenger traffic existing in the various stations, requires a continuing and intimate knowledge thereof, which the Terminal Lines possess. The city is not equipped to function effectively in this area. It follows that the choice as to the instrumentality to be used for that purpose properly belongs to the Terminal Lines. These facts preclude the selection of an operator of terminal vehicles by anyone other than the Terminal Lines. While the city has power to regulate the operation of terminal vehicles incidently

[22] See *Status of Parmelee Transp. Co.*, 288 I.C.C. 95, at 100.

to its regulation of street traffic generally, it has no power, directly or indirectly, to designate who shall own or operate such vehicles. The prior ordinance recognized this situation. It was limited to terminal vehicles having contracts with the Terminal Lines and, as to which vehicles, it exercised certain police powers of the city relating to traffic regulation. That ordinance made no attempt, and it was not intended, to select the operator of the service. In contrast, the 1955 ordinance consists of provisions which, in effect, name Parmelee as the exclusive operator of terminal vehicles in Chicago even though it has no contract with the Terminal Lines which are under a federally imposed obligation to furnish this terminal facility. Each of the Terminal Lines, which sells through tickets calling for interstate transportation in Chicago, thereby assumes an individual obligation to the passenger to furnish that service. Yet, under the 1955 ordinance, that railroad would have no direct control over the operator of that service and no opportunity to protect itself by an agreement indemnifying it from claims of passengers for damages arising out of the negligence of the operator. Other obvious considerations point to the practical necessity of a continuing control by the Terminal Lines of the instrumentality furnishing the service covered by the coupons sold by those lines to interstate passengers.

3. However, the city contends that the 1955 ordinance not only retains the police regulations of the prior ordinance, but demonstrates the city's concern with all passenger vehicles for hire, and specifically with the effect of the number of taxicabs as well as terminal vehicles on the safety of existing vehicular and pedestrian traffic. The city contends that in this respect the ordinance is valid as an exercise of the police power.

But the Terminal Lines argue that the 1955 ordinance was adopted for the sole and evident purpose, not of police power regulation, but of economic regulation. They say that, not only would the 1955 ordinance add nothing in respect to police power regulations that were not contained in the prior ordinance, but that the 1955 ordinance added

"elaborate requirements for proof of public convenience and necessity and other elements of economic regulation of interstate commerce * * *." They add "that these new economic regulations would apply to all except Parmelee; Parmelee was granted a perpetual franchise free from these requirements. The amendment eliminated the requirement that no one could obtain a license unless he had a contract for interstation transfer with the railroads. The amendment unmistakably marked the ordinance as . . economic regulation not within the city's power."

Significant is §28-31.1 of the 1955 ordinance which provides that no license for any terminal vehicle shall be issued except in the annual renewal of such license or upon transfer to permit replacement of a vehicle for that licensed, unless, after a public hearing, the commissioner shall report to the council that public convenience and necessity require additional terminal vehicle service and shall recommend the number of such vehicle licenses which may be issued. It is further provided that, in determining whether public convenience and necessity require such additional service, the following, *inter alia*, shall be considered: "2. The effect of an increase in the number of such vehicles on the safety of existing vehicular and pedestrian traffic in the area of their operation; * * *".

Terminal Lines argue that these are the only provisions of the 1955 ordinance which could even appear to relate to public safety. But they aver that, as a purported safety measure, this is sham and spurious.

To us it appears that the cost of maintaining the terminal vehicle service, which is initially borne by Transfer and ultimately, to the extent of coupons issued and used, by the individual Terminal Lines, will operate effectively as an economic brake upon any unjustified increase in the number of such vehicles. Moreover, if and when a greater number is demanded by the growth of interstate passenger traffic, the city would then have no right, in the guise of an exercise of its police power, to cripple interstate commerce by preventing a justifiable increase in the number of such vehicles required to meet the needs of that commerce.

We are thus led to conclude that there is no valid legal basis for the above-cited provisions of §28-31.1 of the 1955 ordinance. We are convinced that those provisions, which would in effect limit the number of terminal vehicle licenses to those held by Parmelee on July 26, 1955 and give Parmelee perpetual control thereof, constitute a designation of Parmelee by the council of the city, in lieu of Transfer, the instrumentality selected by the Terminal Lines, rather than an exercise of the city's police power over traffic. In this critical aspect the 1955 ordinance is invalid. If there were any doubt that this conclusion is correct, the legislative history of the ordinance dispels that doubt.

At meetings of the committee which recommended the 1955 ordinance for passage, the committee chairman made it clear that the objective sought was the assumption by the city of the authority to designate the instrumentality which was to operate terminal vehicles between railroad stations in Chicago. The proceedings of the committee fail to indicate that the chairman or any member of the committee was interested in traffic regulations or any other aspect of the city's police power.

In attempting to justify the 1955 ordinance, which admittedly retained police regulations contained in the prior ordinance, the city points to photographs of two transfer vehicles which, the city says, do not comply with retained §28-4.1, which provides that no vehicle having a seating capacity for more than 7 passengers shall be licensed as a public passenger vehicle unless at least 3 doors on each side or a fixed aisle space is provided, and retained §28-17, which provides that it is unlawful to permit more than one passenger to occupy the front seat with the chauffeur. There is no indication in the record that any terminal vehicles used by Transfer, except the two appearing in the photographs, violate §28-4.1. Even if §28-4.1 and §28-17 are violated, that fact does not empower the city to bar, or even suspend, the operations of Transfer. *Castle* v. *Hayes Freight Lines*, 348 U.S. 61. The fact that Hayes was operating trucks under a federal certificate of convenience and necessity, under Part II of

the Interstate Commerce Act,[23] does not distinguish that case in principle from the present case in which Transfer is engaged in a federally authorized activity. See 49 U.S.C.A. §302(c)(2), *supra*. If Transfer's vehicles do not conform to the requirements contained in the prior ordinance,[24] the city may refuse to issue licenses for the nonconforming vehicles and penalize their unlicensed operation in accord with §28-32. So, also, whenever Transfer is found guilty of violating §28-17 the city may proceed against it according to the penalties section.[25]

Undoubtedly the city has power to require that one engaged exclusively in interstate commerce may be required to procure from the city a license granting permission to use its highways and in addition pay a license fee demanded of all persons using automobiles on its highways as a tax for the maintenance of the highways and the administration of the laws governing the same. Highways being public property, users of them, although engaged exclusively in interstate commerce, are subject to regulation by the state or municipality to ensure safety and convenience and the conservation of the highways. Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep. Common carriers for hire, who make the highways their place of business, may properly be charged a tax for such use. *Clark* v. *Poor*, 274 U.S. 554, 557.

Both the language of the 1955 ordinance and its legislative history point to the fact that it is not legislation governing the manner of conducting a business or providing for a contribution toward the expense of highway maintenance, but that it requires a license, the granting of which, in turn, is made dependent upon the consent of the

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[23] 49 U.S.C.A. §301, *et seq.*

[24] Ch. 28, Chicago Municipal Code.

[25] §28-32. "Any person violating any provision of this chapter for which a penalty is not otherwise provided shall be fined not less than $5.00 nor more than $100.00 for the first offense, not less than $25.00 nor more than $100.00 for the second offense during the same calendar year, and not less than $50.00 nor more than $100.00 for the third and succeeding offenses during the same calendar year and each day that such violation shall continue shall be deemed a separate and distinct offense."

city to the prosecution of a business. This is not a valid requirement. See *Sault Ste. Marie* v. *International Transit Company*, 234 U.S. 333, 340, 58 L. ed. 1337, 1340.

As we have seen, the 1955 ordinance eliminated from §28-1 of the prior ordinance a requirement that a terminal vehicle must be operated under contracts with railroad and steamship companies, and, by a new section, §28-31.1, in effect permitted Parmelee's existing terminal vehicle licenses to become perpetual by means of annual renewal or by transfer to a replacement vehicle, and also provided, in effect, that Transfer could not obtain any terminal vehicle license unless it proved to the satisfaction of the public vehicle license commissioner "that public convenience and necessity shall require additional terminal vehicle service".

In *Buck* v. *Kuykendall*, 267 U.S. 9307, it appears that Buck wished to operate an autostage line as a common carrier for hire for through interstate passengers, over a public highway in the state of Washington. Having complied with the state laws relating to motor vehicles and owners and drivers, and alleging willingness to comply with all applicable regulations concerning common carriers, Buck applied to the state for a preseribed certificate of public convenience and necessity. It was refused on the ground that the territory involved was already being adequately served by the holder of a certificate and that adequate transportation facilities were already being prov. ed by four connecting autostage lines, all of which held such certificates from the state. The state relied upon its statute which prohibited common carriers for hire from using the highways by auto vehicles between fixed termini, or over regular routes, without having first obtained from the state a certificate of public convenience and necessity. Speaking of that statute, the court said, at 315:

> "• • • Its primary purpose is not regulation with a view to safety or to conservation of the highways, but

the prohibition of competition. It determines not the manner of use, but the persons by whom the highways may be used. It prohibits such use to some persons while permitting it to others for the same purpose and in the same manner. * * * Thus, the provision of the Washington statute is a regulation, not of the use of its own highways, but of interstate commerce. Its effect upon such commerce is not merely to burden but to obstruct it. Such state action is forbidden by the Commerce Clause. * * * ".

To the same effect is *Mayor of Vidalia* v. *McNeely*, 274 U.S. 676, at 683.[26]

4. We hold that it was unnecessary for Transfer to apply for licenses under the 1955 ordinance, because the issuance thereof unlawfully required a consent by the city to the prosecution of Transfer's business and was not merely a step in the regulation thereof. Being unnecessary, the relief prayed for herein may be granted without a showing that such application had been made before this suit was filed.

For the reasons hereinbefore set forth, the judgment of the district court is reversed and this cause is remanded to that court for further proceedings not inconsistent with the views herein set forth.

REVERSED AND REMANDED.

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[26] Both sides in the case at bar rely on *Columbia Terminals Co.* v. *Lambert*, 30 F. Supp. 28, appeal dismissed, 309 U.S. 620. The court there said that the question whether the state could demand that Columbia Terminals prove that its interstate commerce transfer operation would benefit the state, in order to obtain a state permit therefor, was not before it, because the state expressly admitted it lacked such power and made no such demand. The court said, at 31:

"Since this statute applies to interstate as well as intrastate contract haulers, if the complaint alleged or the evidence disclosed such action on the part of the State Commission, plaintiff would be entitled to relief from such action on the part of the state officials. * * * But when the State * * * undertakes to exercise the right to say what interstate commerce will benefit the State and what will not, such action, with certain exceptions immaterial here, constitutes an unconstitutional violation of the commerce clause."

While this is dictum, it is in accord with our holding herein.